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No. 88-7247

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BRYAN STUART LANKFORD,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITIONER'S REPLY BRIEF UNDER RULE 22.5

This reply brief addresses arguments first raised in Respondent's "Response to the Petition for Writ of Certiorari to the Supreme Court of Idaho" (hereafter, "BIO").

1. Procedural matters. Respondent advances two procedural objections to this Court's consideration of the issues presented in the Petition for Certiorari. Both are groundless.

a. Acting on petitioner Lankford's first certiorari petition, this Court granted the writ, vacated the judgment of the Idaho Supreme Court affirming Lankford's death sentence, and remanded for reconsideration in light of Satterwhite v. Texas. Lankford v. Idaho, 108 S. Ct. 2815 (1988). On remand, the Idaho Supreme Court again affirmed the death sentence. Respondent argues that "[w]ith respect to the issues previously presented to this court (sic) by Lankford's prior petition, this Court has already acted on that petition and limited its response to a remand for reconsideration...in light of Satterwhite"; thus, the only issue open to petitioner on a second certiorari petition is the Satterwhite issue. BIO, page 7.

This misconceives the nature of a grant/vacate/remand disposition and ignores the Court's settled practices. Even if the Court had denied Lankford's first certiorari petition, that

denial would not have constituted a ruling on the merits of the issues presented, and would not have foreclosed their consideration on the merits in any subsequent proceeding. Brown v. Allen, 344 U.S. 443, 489-497 (1953) (opinion of Justice Frankfurter, expressing the position of the majority on this point, see 344 U.S. at 451-452); see e.g., Turner v. Murray, 476 U.S. 28 (1986) (granting relief on an issue on which certiorari had previously been denied); Maynard v. Cartwright, 108 S. Ct. 1853 (1988) (same); see also Darden v. Wainwright, 477 U.S. 168 (1986). And if the Court had granted certiorari, heard argument, and then concluded that the Satterwhite issue required a remand, it would certainly have heeded the familiar "policy of strict necessity in disposing of constitutional issues" (Rescue Army v. Municipal Court, 331 U.S. 549, 568 (1947)) and would have reserved judgment on all other issues in the case. See e.g., Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978); Hitchcock v. Dugger, 107 S. Ct. 1821, 1822 n.1 (1987). A fortiori, the Court's action in granting Lankford's first certiorari petition, vacating the judgment below, and remanding on a single ground does not estop the Court after remand from considering issues presented but not decided in the earlier certiorari proceeding. To do so is fully within the Court's power and consistent with its prior practice. Burger v. Kemp, 107 S.Ct. 3114, 3119 (1987). See Burger v. Zant, 467 U.S. 1212 (1984) and Burger v. Kemp, 474 U.S. 806 (1985); see also Rogers v. Richmond, 365 U.S. 534 (1961).

b. Respondent contends that Questions I and IV in the present certiorari petition raise "issues not previously considered by the Supreme Court of Idaho" (BIO, page 4). In fact, Question I was explicitly decided by the Idaho Supreme Court in its original opinion affirming Lankford's death sentence: that opinion rejected Lankford's "attack[ ] [on] the constitutionality of Idaho's capital punishment procedure...because the statute does not require jury participation in the sentencing procedure," saying: "The issue of jury participation has been resolved in Idaho in State v. Creech,...and approved under the United States

Constitution in McMillan...v. Pennsylvania, 477 U.S. 79...(1986)." 113 Idaho at 697, Appendix A to the Petition for Certiorari, page A-5. (The issue was raised again in the Idaho Supreme Court on remand, as described in the Petition for Certiorari, page 9). Question IV was first presented to the Idaho Supreme Court on remand (see id., page 10); it was not explicitly addressed in that court's opinion; and the only reference in the opinion to a refusal to consider any issues on the merits relates to "other issues of state law previously raised on direct appeal," Appendix B to the Petition for Certiorari, page B-8 (emphasis added). Thus the rule of Michigan v. Long, 463 U.S. 1032 (1983), and Harris v. Reed, 109 S.Ct. 1038 (1989), is applicable; and Question IV is properly presented for review. See also Smith v. Digman, 434 U.S. 332 (1978) (per curiam).

2. The first question presented: the Sixth Amendment right to jury trial. Respondent argues that Hildwin v. Florida, 109 S.Ct. 2055 (1989) (per curiam), resolves the conflict between the Idaho Supreme Court's decision here and the Ninth Circuit's decision in Adamson v. Ricketts, 865 F. 2d 1011 (9th Cir. 1988)(en banc). But Hildwin dealt with the particular Florida statutory scheme upheld in Spaziano v. Florida, 468 U.S. 447 (1984), under which a jury renders an advisory verdict of life or death, and the judge is free to override the jury's life verdict only if the case for death is so strong that virtually no reasonable person could disagree. See id., at 465 ("[t]his Court has already recognized the significant safeguard the Tedder standard affords a capital defendant in Florida," citing Dobbert v. Florida, 432 U.S. 282, 294-295 (1977), and Proffitt v. Florida, 428 U.S. 242, 249 (1976)). The per curiam opinion in Hildwin explicitly found the issue before it controlled by Spaziano, stating the issue and its holding with precision: "If the Sixth Amendment permits a judge to impose a sentence of death when a jury recommends life imprisonment,...it follows that it does not forbid the judge from making the written findings that authorize imposition of a death

sentence when the jury unanimously recommends a death sentence [as Hildwin's jury did]." 109 S. Ct. at 2056.

Idaho's procedure differs altogether from Florida's. In Idaho, the jury plays no role at all in capital sentencing. The factual finding of a statutory aggravating circumstance which renders the defendant eligible for a death sentence is made solely by the court. See Idaho Code §19-2515(c), (g), Appendix C to the Petition for Certiorari, page C-1. Thereafter, the court may consider nonstatutory aggravating circumstances as well as statutory aggravating circumstances and mitigating circumstances in a weighing process that produces the sentence of life or death. Idaho Code §19-2515 (c), (d), (e). Petitioner Lankford does not contend that either the findings of nonstatutory aggravating circumstances or the ultimate sentencing judgment must be made by a jury, but that the Sixth Amendment requires a jury finding of the factual existence of the one or more statutory aggravating circumstances that spell the difference between non-capital and capital murder. If the Sixth Amendment does not guarantee a jury trial on such facts--issues of actus reus and mens rea that state law requires to be proved beyond a reasonable doubt to make a defendant eligible for a qualitatively more severe sentence--it is hard to conceive of any factual issue which the Constitution would reserve for juries in criminal trials.

If Hildwin forecloses this claim, then Hildwin has extended Spaziano so as to eviscerate fundamental and long-settled Sixth Amendment principles not discussed in either opinion (see Petition for Certiorari, page 12, n.4). The Court has not previously undertaken to decide issues of this magnitude without briefing or argument.

3. The second question presented: the denial of fair notice and opportunity to prepare for a capital sentencing hearing. Respondent treats this question as resolved by Dobbert v. Florida, 432 U.S. 282 (1977). BIO, pages 9-10. Of course, it is not. Dobbert might control the question whether aggravating

circumstances need to be specifically pleaded in a capital prosecution, but that is not the question presented by the Petition for Certiorari or the facts of Lankford's case. The question here is whether, when a prosecuting attorney serves written notice on a criminal defendant that the death penalty will not be sought, a trial court may impose a sentence of death without first informing the defendant that the appropriateness of such a sentence is an issue to be tried and giving the defendant a fair opportunity to prepare to try it. Neither Dobbert nor any other decision of this Court sanctions this "indefensible sort of entrapment by the State," Raley v. Ohio, 360 U.S. 423, 438 (1959).

Respondent argues that Petitioner's counsel was not misled by the written notice that the prosecution was not seeking the death penalty, contending that the defense was adequately informed of the facts by access to a preliminary hearing transcript. BIO, pages 10-11. First, the argument mischaracterizes the quantity and quality of information available to defense counsel before sentencing. The preliminary hearing transcript did not contain the testimony of sixteen witnesses who testified at trial, including the defendant. The audio tapes to which Respondent refers covered seven days of testimony, and were provided to new defense counsel on the morning of October 11, 1988, less than 24 hours before the sentencing hearing.

Moreover, Respondent misses the critical issue. The question here is not what information defense counsel had available to her, but in what manner she was led to believe that information was to be examined and used. Because the prosecution had responded to an order of the trial court by giving formal notice that it did not intend to seek the death penalty, defense counsel's review and use of the information available to her, in the short time she had, was never focused on the death sentencing issues or evidence of statutory aggravating factors. All of counsel's tactical and strategic decisions in the preparation and conduct of the sentencing hearing - - whether to use the 24 hours available to her to prepare witnesses or to listen to the audio tapes of the

trial; the focus and content of the evidence to be produced by defense witnesses; which defense witnesses to call; whether to call the defendant; what argument to be made in light of the evidence produced - - were all shaped by the State's representation, and the trial court's apparent acquiescence, that the death penalty was not in issue. See Coleman v. McCormick, 874 F.2d 1280 (9th Cir. 1988) (en banc). Under these circumstances, the adequacy of the implicit statutory notice on which Respondent relies (BIO, page 10) is a serious constitutional question squarely presented.

Nor should the Court should be misled by Respondent's assertion that this issue was not presented to the Idaho Supreme Court. BIO, page 11. The issue and argument was fully presented to the Idaho Supreme Court. A copy of the extensive argument made in Petitioner's direct appeal on this point is attached as Appendix A.

4. The third question presented: the denial of the right to test information supporting a capital sentence by the basic adversary procedures of confrontation and cross-examination. Respondent treats this question as resolved by Williams v. New York, 337 U.S. 241 (1949). BIO, pages 13-14. This ignores the "constitutional developments which require us to scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949." Gardner v. Florida, 430 U.S. 349, 357 (1977)(plurality opinion). Gardner does not control the specific issue presented here--whether a death sentence may be based on adversarially untested extra-record evidence--but neither does Williams after Gardner. The issue merits this Court's review.

5. The fourth question presented: the imposition on a capital defendant of the burden of persuading the sentencer that mitigating circumstances "make the imposition of the death penalty unjust." Respondent does not contest that the burden of persuasion imposed on capital defendants by the Idaho statute is inconsistent with the federal constitutional rulings in Adamson v. Ricketts, 865 F. 2d 1011 (9th Cir. 1988) (en banc), and Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). Certiorari should be granted to consider the merits of the issue which respondent does argue. BIO, pages 14-15.

Respectfully submitted,

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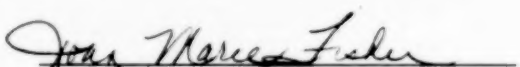
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of August, 1989, served a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF UNDER RULE 22.5, by placing same in the United States mail, first class postage prepaid, addressed to Lynn E. Thomas, Solicitor General, State of Idaho, Boise, Idaho 83720.



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